IN THE HIGH COURT OF BOMBAY AT GOA

Income Tax Appeal No. 33/2002

The Commissioner of Income Tax,
having Office at Aayakar Bhavan,
Patto Plaza, Panaji, Goa. ..... Appellant.

V/s.

1. M/s. Sesa Goa (India) Ltd.
   Having Office at Rua de Ourem,
   Panaji, Goa.

2. The Income Tax Appellate Tribunal,
   Panaji Bench, Aayakar Bhawan,
   Patto Plaza, Panaji, Goa. ..... Respondents.

Mr. S. R. Rivonkar, Advocate for the Revenue.

Mr. V. Frank, Advocate for the respondent Assessee.

CORAM : R.M. LODHA &
N.A. BRITTO, JJ.

DATE : 23RD AUGUST, 2005.

ORAL JUDGMENT : (Per R. M. LODHA, J.)

This appeal under Section 260A of the Income Tax Act, 1961 is at the instance of the Revenue.

2. The appeal has been admitted on the following substantial questions of law :

I. Whether on the facts and in the circumstances the ITAT was justified in holding that the assessee is entitled for deduction on account of investment allowance, by ignoring the fact that the assessee is engaged only in processing activity and not in production and manufacturing of any article or thing, ignoring the decision of the Hon'ble Supreme Court in the case of "CIT V/s. N.C. Budharaja & Co" (204 ITR 412) ?

II. Whether on the facts and in the circumstances of the case the ITAT, was justified in allowing the claim of the assessee of Rs.90,000/- being fees paid to the Registrar of Companies for increasing the authorised capital of the company for the purpose of issuing bonus shares, based on the decision of the Hon'ble Bombay High Court in the case of "Bombay Burmah Trading Corp. v/s. CIT" (145 ITR 793), ignoring the decision of the Hon'ble Supreme Court om the case of "Punjab State Development Corp. V/s. CIT" (225 ITR 792) ?

III. Whether on the facts and in the circumstances of the case the ITAT was justified in directing to grant the depreciation of Rs.76,368/- totally

> ignoring explanation - 8 to Section 43(1) of the I.T. Act ?"

3. As regards the substantial question of law No.I, the learned Counsel for the Revenue fairly conceded that in view of the decision of this Court in the case of ***Commissioner of Income Tax vs. Sesa Goa Ltd.*** 2004 ITR 126, he does not have anything to say and as per the said decision, the said question has be decided against the Revenue and in favour of the assessee.

4. In the case of ***Commissioner of Income Tax vs. Sesa Goa Ltd. (supra),*** the Division Bench considered the Judgment of the Apex Court in the case of ***CIT Vs. N.C. Budharaja and Co.*** [1993] 204 ITR 412 and Judgments of various High Courts wherein N. C. Budharaja and Co. were considered and observed thus:

> " The Apex Court in the case of CIT v. N.C. Budharaja and Co. [1993] 204 ITR 412, has again reiterated the expression 'manufacture' used in Deputy CST (Law) Board of Revenue (Taxes) v. Pio Food Packers [1980] 46 STC 63 (SC). The apex court noted both the words `manufacture' and 'production' have received extensive judicial attention both under the Income tax Act as well as

the Central Sales Tax Act and various sales tax laws. It further observed that the expressions 'manufacture' and 'production' are normally associated with movable articles and goods, big and small. We may now consider some of the judgments of the High Courts relied upon by the learned counsel for the purpose of finding out whether extraction or raising of ore would amount to manufacture or production, considering the entire process from the stage of extraction till its export as it would be an integral part of the business of mining. The first case we have before us is CIT v. Gogte Minerals (No.2) [1997] 225 ITR 60 (Karn). It is no doubt true that in this case the test as applied in case of CIT vs. N.C. Budharaja and Co. [1993] 204 ITR 412 (SC), was not considered. The case involved excavation of iron ore. The Division Bench of the Karnataka High Court considering the issue, observed, that what was being considered was mining operation carried out for excavation of iron ore and sequestering of some other materials. It involves a process and there is complete transformation of material from one form to another altogether and does not continue to be in same form, as we found in the earth before escavation. When such complicated process is involved, it cannot be said that there is no manufacturing activity because what is brought

in to existence is iron ore. Thus it must be stated that the process involved is a manufacturing activity. It may be noted that what the Division Bench of Karnataka High Court observed was that mere removing from the earth by itself is not manufacture, but various processes which there after are applied would amount to manufacture. The next Judgment we have is the case of CIT v. Mysore Mineral Ltd. (No.1) [2001] 250 ITR 725 (Karn). This was a case in respect of mining of granite. The Division Bench held that it would amount to manufacture relying on an earlier judgment in the case of CIT v. Mysore Minerals [1994] 205 ITR 461 (Karn). The criticism against this judgment is that this judgment relied upon an earlier judgment in the case of Mysore Minerals which has been reversed by the Apex Court in CIT v. Mysore Minerals Lt. [2001] 247 ITR 301, and as such would not longer be a good law. Considering that aspect, we do not propose to consider the ratio of the said judgment. The next judgment relied upon is Deputy CIT v. Mysore Minerals Ltd [2001] 250 ITR 730 (Karn). In this case also what was involved was mining of granite. The learned Division Bench of the Karnataka High Court relied upon the judgment in CIT v. N.C. Budharaja and Co. [1993] 204 ITR 412 (SC) and explained and distinguished it. In that case the process involved

extracting granite and converting it into slabs, cutting and polishing them. This was held to be a manufacturing activity. In CIT v. Mysore Minerals Ltd. [2001] 250 ITR 728 (Karn)., again the matter involved granite. The Division Bench observed that it stands concluded in view of the Judgment in CIT v. Mysore Mineral Ltd. [2001] 250 ITR 725 (Karn.).

Therefore, if the tests as laid down in the judgments of the apex court and considered in the various judgments of the High Courts and even considering that various processes are involved, would mere extraction of iron ore from the earth amount to `manufacture'? In the instant case, considering the material on record, as noted by the apex court, iron ore is merely extracted by removing the top soil. That by itself would not amount to manufacture, if the tests considered by the apex court in its various judgments are applied. In Chowgule and Co. Pvt. Ltd. v. Union of India [`1981] 41 STC 124 (SC), which was a case under the Central Sales Tax Act and what was under consideration was Section 8 and rule 13 of the rules, the apex court held that even if the various processes are applied, it is commercially the same article, namely, ore. The composition may change, the content may change, but as noted by the apex court, the ore extracted commercially continues to be ore. It would, therefore, not be possible for us to

accept the contention that extraction of ore and the the various processes which it undergoes until it is sold amounts to `manufacture'. In our opinion, the various processes applied do not amount to `manufacture' and, consequently, it would be difficult to hold that the extraction of ore amounts to manufacture."

5. The Division Bench went on to observe further as follows :

" The question there is whether extraction of ore and the various processes would involve `production'. The expression `production' again is no longer res integra, having been considered by the apex Court in the case of CIT v. N.C. Budharaja and Co. [1993] 204 ITR 412. The apex Court noted in the said judgment that the word `production' or 'produce when used in juxtaposition with the word `manufacture' takes in bringing into existence new goods by a process which may or may not amount to manufacture. Three High Courts, at least, have taken the view that the extraction of ore would amount to `production'. We first have the judgment of the Andhra Pradesh High Court in CIT v. Singareni Colleries Co. Ltd. [1996] 221 ITR 48. A Division Bench of the Andhra Pradesh High Court was considering the expression `production'. The

Andhra Pradesh High Court noted the argument of the Revenue against the finding of the Tribunal which had held that extracting coal or winning coal from a coal mine is an article or thing produced. The argument was then noted that the contention of the Revenue that coal which is extracted from the mine is not an article or thing. What was contended is that winning or escavating coal is not an activity of production. The leaned Division Bench then relied on the judgment in case of CIT v. N.C. Budharaja and Co. [1993] 204 ITR 412 (SC) and also placing reliance on Webster's New International Dictionary, for the word `produce', which is denied to mean `something that is brought forth or yielded either naturally or as a result of effort and work'. In shorter Oxford English Dictionary, the meaning given is: `To bring forward, bring forth or out; to bring into being or existence. In Black's Law Dictionary, the expression `produce' is `To bring forward; to show or exhibit; to bring into view or notice; to bring to the surface'. Considering the language used and also placing reliance on the provisions of section 35E of the Income-tax Act, the learned Division Bench noted that `production of mineral' is used in the allied provisions of the Act itself and it is a definite point that Parliament employed the expression `production' to the minerals extracted

from underneath the surface. For all those reasons, the learned Division Bench took the view that it amounted to `production'. Another learned Division Bench of the Delhi High Court in CIT v. Univmine (P.) Ltd. [1993] 202 ITR 825, observed that mining of marble would amount to carrying on business of production and for that purpose placed reliance on the case of Chrestien Mica Industries Ltd. V. State of Bihar [1961] 12 STC 150 (SC), where the apex court held that the process of mining mica is a process of production. We also have the judgment of another learned Division Bench of the Culcutta High Court in the case of CIT v. G.S. Atwal and Co. (GUA) [2002] 254 ITR 592. The Division Bench observed, taking into consideration the various contentions and judgments which were involved, that winning of coal is `production'. The learned Division Bench considering the earlier judgment of Chakravartti C.J., which was later on approved by the Supreme Court, where the Culcutta High Court had taken the view that winning of coal is no doubt `production'.

From the dictionary meaning of what would amount to `production' and the judgments of the Andhra Pradesh High Court, Delhi High Court and the Calcutta High Court, the question would be whether the view taken by the Income-tax Appellate

> Tribunal can be upheld on the ground that extraction or winning of ore would amount to `production'. Our attention had been invited to Section 32A to hold that considering items and goods not included in the Eleventh Schedule, they would be entitled to the benefit under section 32A of the said Act. Our attention was also invited that earlier under section 33 of the said Act, an assessee would have been entitled to the benefit of development rebate, which is no longer available. Iron ore was specifically included in the Fifth Schedule and, consequently, was entitled to the development rebate. The Act also contains internal evidence to show that the Legislature has treated raw ore differently from processed ore. A Division Bench of this court in CIT v. Emirates Commercial Bank Ltd. [2003] 262 ITR 55 has given the benefit even in respect of data processing done on computers. In other words, the legislation being a beneficial piece of legislation, an expanded meaning should be so given and has to be given."

6. In view of the aforesaid decision with which we concur, it cannot be said that the extraction of ore would not amount to 'production'. The assessee was, therefore, entitled for deduction on account of investment allowance.

7. As regards the substantial question of law No.II, the learned Counsel for the Revenue heavily relied upon the Judgment of the Supreme Court in the case of ***Punjab State Industrial Development Corporation Limited v. Commissioner of Income Tax,*** 225 ITR 792. In that case, the question before the Apex Court was whether the amount of fee paid to the Registrar of Companies as filing fee for enhancement of capital was not revenue expenditure ? The Supreme Court noticed the conflict of opinions amongst various High Courts and on examination of these issues held that the fee paid to the Registrar for expansion of the capital base of the company was directly related to the capital expenditure incurred by the company and although incidentally that would certainly help in the business of the company and may also help in profit making, it still retains the character of a capital expenditure since the expenditure was directly related to the expansion of the capital base of the company. It may be noticed here that the Supreme Court in ***Punjab State Industrial Development Corporation Limited v. Commissioner of Income Tax (supra)*** also considered the Judgment of this Court in ***Bombay Burmah Trading Corp. v/s. Commissioner of Income-tax*** [1984] 145 ITR 793.

8. The learned Counsel for the assessee, however, submitted that the Judgment of the Apex Court in the case of ***Punjab State Industrial Development Corporation Limited v. Commissioner of Income Tax (supra)*** shall not be applicable, as in the present case the fee was paid to the Registrar of Companies in connection with the issue of bonus shares and that fee cannot be treated as capital expenditure, but would be allowable as being of a revenue nature. In this connection, he placed reliance on the Division Bench Judgment of this Court in the case of ***Bombay Burmah Trading Corp. v/s. Commissioner of Income-tax (supra).***

9. In our considered view, from the facts of this case, it is clear that the assessee claimed deduction of the expenses of Rs.90,000/- paid to the Registrar of Companies for increasing the authorised capital of the company for the purpose of issuing bonus shares. That was ultimately allowed by the Income-Tax Appellate Tribunal. The fees of Rs.90,000/- paid by the assessee to the Registrar of Companies, was not an expenditure for the purpose of issuing bonus shares but was for the purpose of increasing the authorised capital of the company though for the purpose of issuing

bonus shares. The decision of the Supreme Court in the case of ***Punjab State Industrial Development Corporation Limited v. Commissioner of Income Tax (supra)*** is, thus, squarely applicable. The fee paid by the assessee to the Registrar of the Companies for increasing the authorised capital of the company for the purposes of issuing bonus shares is held to be capital expenditure. The substantial question of law No. II is, accordingly, decided in favour of the Revenue and against the assessee.

10. As regards the substantial question of law No.III, the learned Counsel for the Revenue could not dispute that Explanation 8 appended to Section 43 relates to the amount paid or is payable by way of interest. In that event, the said provision shall not be applicable where the exchange rate difference had arises in relation to repayment of loan and not repayment of interest. In this situation, Section 43-A of the I.T. Act is directly attracted. The finding of the Income-tax Appellate Tribunal on this issue cannot be faulted.

11. We, accordingly, conclude thus :

i) The substantial question of law No.I is decided

against the Revenue and in favour of the assessee.

(ii) The substantial question of law No.II is decided in favour of the Revenue and against the assessee.

(iii) The substantial question of law No.III is decided in favour of the assessee and against the Revenue.

12. The appeal is disposed of in the aforesaid terms. No costs.

R. M. LODHA, J.

N.A. BRITTO, J.

ssm.